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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255



WILLIE MAE BARKER,
*Petitioner,*

v.

JOHN W. WINGO, WARDEN,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR THE PETITIONER

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Washington, D. C. THIEL PRESS 202 393-0625

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the District Court for the Western District of Kentucky is unreported and may be found in the Joint Appendix (Page 20). The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 442 F.2d 1141 (6th Cir. 1971).

## OPINION BELOW

## JURISDICTION

After conviction, Petitioner filed an appeal to the Court of Appeals of Kentucky alleging he was denied his right to a speedy trial; that court affirmed the conviction. Petitioner then filed a writ of Habeas Corpus in the District Court for the Western District of Kentucky alleging that he was denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution. The Petition was denied by the District Court on June 1, 1970. Petitioner appealed the order of the District Court to the United States Court of Appeals for the Sixth Circuit which affirmed the District Court's order on May 20, 1971. The Petition for a Writ of Certiorari and Motion to Proceed in Forma Pauperis were filed August 16, 1971, and granted January 17, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether Petitioner is required to make a demand for trial and show he was prejudiced by the delay in order to preserve his right to a speedy trial under the Sixth Amendment.

## CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States of America:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## STATUTES INVOLVED

Florida Criminal Procedure § 915.01(2):

> When a person has been arrested and released on bond, and thereafter for three successive terms of court, files a written demand for trial (serving a copy on the prosecuting attorney) and he is not brought to trial at or before the third full term after the date he is first committed, he shall be forever discharged from the crime; provided, however, the attendance of the witnesses is not prevented by himself, and he has filed no pleading seeking a continuance.

Kentucky Rules of Criminal Procedure, RCr 9.62:

> Testimony of Accomplice
>
> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. In the absence of corroboration as required by law, the court shall instruct the jury to render a verdict of acquittal.

## STATEMENT

Petitioner was indicted on September 15, 1958, for the murder of Orleana Denton (Tr. 2, 3). The Christian Circuit Court appointed counsel for Petitioner on September 17, 1958, and trial was set for October 21, 1958 (Tr. 2). However, the Commonwealth of Kentucky was then granted sixteen continuances before the final trial date of October 9, 1963 (Tr. 2-9 A. 2-12). Meanwhile, Petitioner had been released on $5000.00 bond on June 4, 1959 (Tr. 4, 13). Petitioner made no objection to the continuances until February 12, 1962, when Petitioner filed a Motion to Dismiss which was overruled (Tr. 7 A. 9). On March 19,

1963, Petitioner objected to a continuance obtained by the Commonwealth of Kentucky (Tr. 8 A.11) and objected to a continuance granted to the Commonwealth on June 17, 1963 (Tr. 9 A. 11). Prior to trial on October 9, 1963, Petitioner filed another Motion to Dismiss (Tr. 10 A.13). The response of the Commonwealth to the Motion for Dismissal on October 9, 1963, stated that an alleged accomplice, Silas Manning, was a material and indispensible witness against Petitioner (Tr. 12 A.14) It was shown by Affidavit of Manning's counsel that he was unavailable as a witness until his trials were completed as he would have asserted his privilege against self-incrimination prior to that time.

The Commonwealth of Kentucky claimed that Manning was the only one who, according to his testimony, actually saw petitioner in the commission of the crimes (Tr. 8).

The Commonwealth proceeded to prosecute Silas Manning ahead of Petitioner. The Commonwealth tried Silas Manning a total of six times for the crimes. Manning's first trial on October 23, 1958, resulted in a hung jury. The second trial in which he was convicted of murder was reversed by the Kentucky Court of Appeals because of the admission of evidence procured through an illegal search. *Manning v. Commonwealth*, Ky. 328 S.W.2d 421, (1959). Manning was again convicted at his third trial, but this trial was again reversed by the Kentucky Court of Appeals because of the refusal by the Court to grant a motion for a change of venue. *Manning v. Commonwealth*, Ky. 346 S.W.2d 759, (1961). Manning's fourth trial again resulted in a hung jury. Finally in March, 1962, Manning was found guilty of the murder of Pat Denton and in December of 1962, he was found guilty of the murder of Orleana Denton (Tr. 11-13).

At no time during this five-year delay did Petitioner in any way contribute to or cause the delay by filing motions for continuances or otherwise. After the convictions of

Silas Manning were final, a further continuance was granted because of the illness of Sheriff Harold McKinney who was a material witness (Tr. 12-15). Barker was then brought to trial on October 9, 1963. The jury returned a verdict of guilty and fixed his punishment at life imprisonment in the state penitentiary (Tr. 3, 27).

Petitioner then appealed to the Kentucky Court of Appeals contending that he was deprived of his constitutional right to a speedy trial and that the testimony of his alleged accomplice was not sufficiently corroborated under Kentucky law. The Kentucky Court of Appeals affirmed the conviction. *Barker v. Commonwealth*, Ky. 385 S.W.2d 671 (1965). On February 25, 1970, Petitioner filed leave to proceed in forma pauperis in the United States District Court for the Western District of Kentucky, and on March 3, 1970, Petitioner filed Habeas Corpus proceedings in that Court contending that he was denied his right to a speedy trial and that the testimony of his accomplice was insufficiently corroborated under Kentucky law. The District Court rejected the Petitioner's contentions. *Barker v. Commonwealth*, Civil Action No. 2046, Western District of Kentucky, 1970, (Tr. 11). Petitioner then filed Motion for leave to Proceed in Forma Pauperis, in the United States Court of Appeals for the Sixth Circuit, the issuance of a certificate of probable cause and Notice of Appeal on June 11, 1970, which motion was granted by the District Court on June 23, 1970. The United States Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court, a written opinion which is reported in *Barker v. Wingo*, 442 F.2d 1141 (1971). Petitioner then filed this Petition for Certiorari in the Supreme Court of the United States which Petition was granted on January 17, 1972. Petitioner was paroled in August, 1971.

## SUMMARY OF ARGUMENT

Although the right to a speedy trial has been held to be as "fundamental as any of the rights secured by the Sixth Amendment," *Klopfer v. North Carolina*, 386 U.S. 213, 223, Petitioner has not received the benefit of the constitutional safeguards which protect the other Sixth Amendment rights.

Petitioner should not have been required to demand trial in order to protect his right to a speedy trial upon penalty of waiver for failure to do so. A waiver of a constitutional right must be the "intentional relinquishment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464. The notion that Petitioner waived his constitutional right by failing to demand trial is contrary to the requirement of an intentional waiver.

Placing the burden of demanding trial upon Petitioner in light of a potential death sentence is wholly unreasonable. If Petitioner demands trial the result could well be death, but if he hesitates and does nothing he is deemed to have waived his right. The demand rule also distorts the proper application of the guilt determination process by shifting the burden of prosecution from the Commonwealth to Petitioner.

An intelligent, voluntary waiver by Petitioner of his right to a speedy trial was impossible in the absence of procedural standards to inform Petitioner when a demand must be made.

Prejudice should be presumed from a delay of five years between indictment and trial. It is now impossible to show actual prejudice from the record, and unless prejudice is presumed, Petitioner's right to a speedy trial will be worthless. The delay of five years resulted in substantial potential prejudice. It is impossible to know the effect of the delay in terms of distorted facts and testimony, forgotten facts, loss of preception of facts. While the delay may not have resulted in actual prejudice visible

from the record, it gave rise to potential substantial prejudice. *United States v. Wade*, 388 U.S. 218, 236.

## ARGUMENT

### I.

### PETITIONER SHOULD NOT BE REQUIRED TO DEMAND TRIAL OR SHOW PREJUDICE TO PRESERVE HIS RIGHT TO A SPEEDY TRIAL

Although the right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution, both federal and state courts have engaged in extensive sophistry in determining whether this right has been violated.

This Court has held that the right to a speedy trial is necessarily relative and depends upon the circumstances of the case. *Pollard v. United States*, 352 U.S. 354. Courts have traditionally cited four factors in determining whether the right to a speedy trial has been denied: (1) length of delay, (2) reason for delay, (3) prejudice to defendant, and (4) waiver by defendant. *Solomon v. Mancusi*, 412 F.2d 88 (2d Cir. 1969); *cert. den.* 396 U.S. 936.

The Sixth Circuit relied on prejudice and waiver in affirming the order of the District Court denying Petitioner relief. The Sixth Circuit held that Petitioner had not objected to the delay until his Motion to Dismiss was filed on February 12, 1963,[1] ignoring the time before the motion in computing the delay (442 F.2d at 1142), and further held that Petitioner failed to show he was prejudiced by the delay (442 F.2d at 1143).

Although the Sixth Circuit followed the great weight of authority in denying Petitioner relief, the decision denied Petitioner the constitutional safeguards necessary to preserve his right.

[1] Although the record shows the motion was filed on February 12, 1962, (Tr. 7) with a resulting delay of 18 months rather than seven months, a petition for rehearing was not filed because the Court decided the case on alternate grounds.

The application of the demand rule and the required showing of prejudice violates safeguards established for the protection of other Sixth Amendment rights. These safeguards should apply with full force to the right to a speedy trial.

This Court elevated the right to speedy trial to the constitutional status and importance of other Sixth Amendment rights in *Klopfer v. North Carolina*, 386 U.S. 213, where it applied the right to speedy trial to the states through the Fourteenth Amendment. The Court in *Klopfer* stated that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment" 386 U.S. 223) and "that it is one of the most basic rights preserved by our constitution." (386 U.S. 226). The Court (at 386 U.S. 222) also reiterated its holding in *Pointer v. Texas*, 380 U.S. 400.

> We hold that Petitioner is entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment and that guarantee, like the right against compelled self incrimination, is "to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against encroachment." *Malloy v. Hogan*, 378 U.S. 1, 10.

Explicit in the application of the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment has been the recognition that the protection of a fundamental right is essential to a fair trial. *Gideon v. Wainright*, 372 U.S. 335, 340, *Washington v. Texas*, 388 U.S. 14; *Pointer v. Texas*, 380 U.S. 400; *Parker v. Gladden*, 385 U.S. 363.

The paramount importance of the personal rights secured by the right to a speedy trial was emphasized in *Klopfer* (386 U.S. 221).

> "The Petitioner is not relieved by the limitations placed upon his liberty by the prosecution merely because its suspension permits him to go 'wither-

> soever he will.' The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes."

In the present case, Petitioner has been denied the constitutional safeguards established by this Court to protect other Sixth Amendment rights.

### A. The Demand Rule Precludes a Valid Waiver

The Sixth Circuit held that Petitioner waived his right to a speedy trial by his failure to demand trial. The demand rule provides that unless a defendant makes some attempt to resist postponement by the prosecution he waives his right to a speedy trial. *Barker v. Wingo*, 442 F.2d 1141, 1142 (6th Cir., 1971). According to the application of this rule, Petitioner by remaining silent during the delay waived his right to a speedy trial. This reasoning necessarily sanctions the passive waiver of a fundamental right.

The sanction of a passive waiver of a constitutional right violates the very essence of constitutional safeguards designed to safeguard the protection of fundamental rights. In light of the Court's pronouncements it is no defense to say a fundamental right may be passively waived. If the right to a speedy trial is as basic and fundamental as other Sixth Amendment rights, the demand rule can no longer be sanctioned.

This Court has consistently rejected passive waiver of fundamental rights. In *Johnson v. Zerbst*, 304 U.S. 458, 464, waiver was defined as "an intentional relinquishment of a known right or privilege." This Court has further stated that Courts should "indulge every reasonable presumption against waiver," *Aetna Insurance Company v. Kennedy*, 301 U.S. 389, and that Courts should "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 307, (see *Dickey v. Florida*, 398 U.S. 30, 49), (Concurring Opinion of Justice Brennan).

301 U.S. 292, 307, (see *Dickey v. Florida*, 398 U.S. 30, 49), (Concurring Opinion of Justice Brennan).

With respect to the Sixth Amendment right to counsel, the notion of passive waiver has been expressly rejected in *Rice v. Olsen*, 324 U.S. 786, where the Court stated (at p. 788) that a "defendant who pleads guilty is entitled to the benefit of counsel and a request for counsel is not necessary." Again in *Carnley v. Cochran*, 369 U.S. 506, the Court emphasized (at p. 512) that waiver of right to counsel cannot be presumed unless the accused intelligently and understandably waives this right, and (at p. 516) "[T]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver." The inherent injustice promoted by the demand rule with its resulting "passive waiver" is the chilling effect the demand rule places upon the right to a speedy trial.

Petitioner was faced with the possibility of a death sentence if convicted. Placing the burden of demanding trial on Petitioner is wholly unreasonable. This extensive burden was emphasized in *United States v. Chase*, 135 F. Supp. 230, 233 (N.D. Ill., 1955), where the Court refused to apply the demand rule:

> The stakes are too high to imply a waiver without some overt act on his part. This is particularly true when the charge is murder; to require a man to beg for trial on such a charge, with its enormous penalty, requires too much of human nature.

The demand rule as applied by the Sixth Circuit placed Petitioner in a perplexing dilemma for, if he demanded trial, the result certainly could have been the death penalty (particularly in light of the two death sentences his alleged accomplice received); yet because he failed to demand trial, the result was a waiver of the right to a speedy trial.

This dilemma is analogous to the situation posed in *United States v. Jackson*, 390 U.S. 570, where the Federal Kidnapping Act, 18 U.S.C. 1201(a) provided that

only the jury could recommend the death penalty. The problem before the Court was:

> "to decide whether the Constitution permits the establishment of such a death penalty, applicable only to these defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."

Striking down the provision, this Court said (390 U.S. 583).

> "For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right."

Imposing the burden of demanding trial upon Petitioner has the same effect the Kidnapping Act had in *Jackson*. Requiring Petitioner to demand trial to preserve his right to a speedy trial potentially exposed him to the death penalty, (in *Jackson*, the insistance on the right to jury trial exposed a defendant to the death penalty) yet since Petitioner did not demand his right, he is held to have waived it. But the penalty is more severe to Petitioner. Unlike a defendant under the Kidnapping Act, Petitioner could still have received the death penalty.

Thus the demand rule, by requiring a defendant to demand trial with its potential enormous penalty; has a chilling effect upon the right to a speedy trial. The penalty awaiting the defendant will necessarily cause him grave apprehension and hesitation in demanding trial, but on the other hand, if he fails to demand trial, or if he delays

his demand the trial can be postponed indefinitely but without lifting the threat of the penalty from the defendant.

While there may be truth to the assumption of the Sixth Circuit that delay ordinarily favors the defendant (442 F.2d 1143), the application of the demand rule distorts the proper function of the guilt determination process which was noted in *People v. Prosser*, 130 N.E.2d 891, 895 (C.A.N.Y. 1955);

> It is the state which initiates the action and it is the state which must see that the defendant is arraigned. It is likewise the state which has the duty of seeing that the defendant is speedily brought to trial.

Under American jurisprudence, an accused is presumed innocent until proven guilty and the state bears the burden of proving guilt. Application of the demand rule subverts this duty of the state by shifting the burden to the accused to take affirmative steps to bring about trial. In effect the burden is shifted to a defendant to prove his innocence by demanding a speedy trial.

Waiver of a constitutional right or privilege must be made voluntarily, knowingly and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 444; *Carnley v. Cochran*, 369 U.S. 506; *Rice v. Olson*, 324 U.S. 786.

An intelligent, voluntary and knowing waiver of the right to a speedy trial is impossible without procedural safeguards setting forth guidelines for demand. Although Petitioner was represented by counsel, the absence of procedural guidelines for a speedy trial required Petitioner to speculate and guess as to when demand should be made.

The Sixth Circuit held that Petitioner failed to make any demand for trial until his motion to dismiss in February 12, 1963 and that the time before the motion was made should not be counted as part of the period of delay in determining whether the right to a speedy trial was violated. (442

F.2d 1142). If this rule be held valid, the question is raised as to when Petitioner should have been required to assert his demand; after one year, two years, every term of Court, after every motion for continuance by the Commonwealth.

The fallacy of the Sixth Circuit position is evident. Petitioner's motion to dismiss was overruled even though there had been a delay of 3 1/2 years. Nevertheless the Sixth Circuit discounted the period before demand. Had Petitioner filed a demand immediately after indictment, it is doubtful that the Sixth Circuit would have considered the period between the demand after indictment and the demand of February 12, 1963 in computing the period of delay. Or had Petitioner made a demand immediately after indictment but made no further demand, it is doubtful the Sixth Circuit would have counted the subsequent five years in computing the delay. If Petitioner had filed a demand every year after indictment, it is questionable at which point the delay would be computed.

A demand made within a relatively short period of time after indictment (e.g. one year) would have been superfluous as there would have been no undue delay, yet according to the Sixth Circuit's reasoning this period would not be considered. Moreover, the fact Petitioner's motion to dismiss was overruled indicates that any motion made prior to that time would also have been dismissed.

The speculation required of Petitioner should be contrasted with § 915.01(2) of the Florida Criminal Procedure which provides for discharge from the crime after demand for trial after three successive terms of Court. Although, even in Florida, the demand rule per se is open to constitutional attack, nevertheless the statute clearly sets forth the right of an accused and the procedure necessary to preserve and assert that right.

Seemingly then, the only purpose served by the demand rule is not to bring about a speedy trial, but rather to preserve an accused's right to object. The application

of the demand rule treats the right to a speedy trial as little more than a procedural nicety which may be waived by failing to preserve an objection.

However the right is a basic and fundamental constitutional right which requires an intelligent, voluntary and knowing waiver. So long as an accused is required to speculate as to when a demand must be made, and how many demands must be made, it is inconceivable how he could knowingly and intelligently waive his right.

### B. Actual Prejudice Should Not Be Required to Be Proven to Assert the Right to a Speedy Trial

The Sixth Circuit held that, aside from waiver, Petitioner failed to show he was prejudiced by the delay. (442 F.2d 1143). Requiring Petitioner to show prejudice to assert his right to speedy trial is contrary to constitutional safeguards established for other Sixth Amendment rights; including the right to counsel, confrontation, public trial, an impartial jury and knowledge of the charge. (See Concurring Opinion of Justice Brennan, *Dickey v. Florida*, 398 U.S. 30, 54). The denial of these rights may or may not result in actual prejudice but this Court has found prejudice was inherent in the denial of a fundamental constitutional right.

This Court has consistently rejected the principle that an accused must show prejudice on the basis that prejudice is difficult if not impossible to prove.

Where a defendant had been denied the right to counsel at arraignment, the Court, in *Hamilton v. Alabama*, 368 U.S. 52, rejected the rationale of the lower Court denying relief that the accused was not disadvantated in any way by the absence of counsel. This Court said (at 368 U.S. 55).

> When one pleads to a capital charge without the benefit of counsel, we do not stop to determine whether prejudice resulted. *Williams v. Kaiser*, 323

> U.S. 471, 475-476; *House v. Mays*, 324 U.S. 42, 45-46, *Uveges v. Pennsylvania*, 335 U.S. 437, 442. In this case, as in those, the degree of prejudice can never be shown.

Use of television cameras in a courtroom was held in *Estes v. Texas*, 381 U.S. 532, to deprive the defendant of his Sixth Amendment right to a public trial even though prejudice could not be shown. In other cases, the Court noted (at 381 U.S. 543) it

> did not stop to consider the actual effect of the practice but struck down the conviction on the basis that prejudice was inherent in it.

The rationale for presuming prejudice occurs because of the great difficulty of proving actual prejudice and is necessary for the protection of constitutional rights.

Justice Brennan stated in *Dickey v. Florida*, 398 U.S. 55 (Concurring Opinion):

> Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice *must* be assumed, or constitutional rights will be denied without remedy.

Constitutional rights are not predicated upon the existence of actual prejudice but upon the existence of potential substantial prejudice which may affect the right to a fair trial. *United States v. Wade*, 388 U.S. 218, 227; *Dickey v. Florida*, 398 U.S. 55 (Concurring Opinion of Justice Brennan).

Potential substantial prejudice is clearly evident in the present case.

The Transcript of Evidence shows that Martha Barber, the sister-in-law of Silas Manning testified that Petitioner was at her house all night long on the night of the murder (Te 111 A. 19). But the record shows that her testimony was affected by a faded memory.

> Q. Did you hear he (Silas Manning) and Barker talking?

A. I think—if I am not mistaken—it has been so long—I just don't know how to think. I think he asked Silas where his car was. (TE 112).

The effect of this testimony is relevant in two respects.

The Commonwealth relied on the location of Petitioner's car to corroborate the testimony of Silas Manning as required by RCr. 9.62 of the Kentucky Rules of Criminal Procedure. Petitioner contended that Silas Manning stole his car. Moreover, the testimony showed that Barker could not have been at the scene of the crime. Recognizing the weight of evidence is for the jury to consider, nevertheless it is unknown what effect this lapse of memory had on the jury. There is at the minimum a reasonable possibility that Petitioner was prejudiced by the lapse of memory of Martha Barber, although actual prejudice cannot be proved.

More significantly, aside from the testimony of Martha Barber, the record shows no specific prejudice to Petitioner in the form of faded memories, lost witnesses or evidence. However, the record is not so important for what it reveals than for what it does *not* reveal.

Apart from the one specific instance of faded memory above Petitioner can show no other specific prejudice from the record. However it is because of this absence of a specific showing of prejudice that prejudice must be assumed to protect the constitutional right of Petitioner. While the record may be black and white, prejudice does not lend itself to such simplistic analysis but covers a wide gray area.

The record does not show nor could it show what the witnesses may have forgotten or what Petitioner may have forgotten over the five year period. The mere failure of a witness to say that he forgot does not mean that he did not forget. The record does not reveal what facts may have become distorted in the minds of witnesses over five years although they might testify with exactitude as

to the distorted facts. Nor can one ascertain whether the perspective of the witnesses has changed over the period of delay.

Assuming from the bare record that Petitioner has not been prejudiced after a five year delay not only ignores realities of human nature but also raises presumptions to the detriment of Petitioner, which presumptions are impossible to overcome. A constitutional right has been denied Petitioner by speculation from a bare record that he has not been prejudiced.

There can be no doubt but that memories fade over a long period of time, *United States v. Mann*, 291 F. Supp. 268, 271 (S.D. N.Y. 1968). Moreover as stated by Justice Brennan in *Dickey v. Florida*, 398 U.S. 30, 53 (Concurring opinion).

> ". . . it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses."

In *United States v. Ewell*, 383 U.S. 116, 120, this Court recognized "the possibilities that long delay will impair the ability of the accused to defend himself."

Therefore while Petitioner may not be able to specifically show actual prejudice, there can be no doubt but that the five year delay involved a grave or substantial potential for prejudice. *United States v. Wade*, 388 U.S. 218, 236. This potential alone should be sufficient to protect the fundamental right to a speedy trial.

Moreover it is impossible to measure the effect of the delay in the personal rights of Petitioner, the public scorn, the anxiety the loss of personal freedom which accompany in indictment for murder. *United States v. Ewell*, 383 U.S. 116, 120; *Klopfer v. North Carolina*, 386 U.S. 213, 222.

Petitioner, although he received life imprisonment, was released on parole in August, 1971 after seven years imprisonment. Had Petitioner been brought speedily to trial

it is reasonable to assume he would have been released from prison several years earlier.

The requirement of showing prejudice also necessitates an after-the-fact application. The remedy for a violation of the right is dismissal of the indictment, *Dickey v. Florida*, 398 U.S. 30. Yet application of the prejudice requirement necessitates, not a dismissal of the indictment, but rather than an accused be brought to trial. If a defendant has been prejudiced, then the indictment is dismissed, but if he does not show prejudice then the indictment and conviction stand. However, the right to a speedy trial is denied, if at all, before the trial, and once it is denied, an accused should be entitled to immediate relief. The issue of prejudice should never arise but rather substantial potential prejudice should be presumed. Petitioner's motion to dismiss on February 12, 1962 and October 9, 1963 should have been granted. His right to speedy trial had been denied and he was entitled to a dismissal of the indictment at that time.

Although not specifically raised by the Sixth Circuit and therefore not placed in issue in this petition is the reason for delay. However since the reason for delay has been held relevent in considering the right to a speedy trial, *Solomon v. Mancusi*, 412 F.2d 88 (2d Cir. 1969) brief mention is made of this point. While the Commonwealth contends that the delay was necessary due to the unavailability of the testimony of Silas Manning, this cannot be sufficient reason. Silas Manning was available at all times. Yet the Commonwealth tried Manning a total of six times for the murders. Two trials resulted in hung juries and two convictions were reversed by the Kentucky Court of Appeals because of errors committed by the Commonwealth. Thus the only reason for the delay was not the absence of a material witness but the difficulty of the Commonwealth in attaining and upholding a conviction because of errors committed by it. Certainly this cannot be a valid reason for delay.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below be reversed, that the Court order the conviction of Petitioner be vacated and that the indictment against him be dismissed.

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